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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 567

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

GEORGE D. MULLIGAN,
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WILLIAM F. DELANEY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 567

HARRY M. VEIX,

Appellant,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORPORATION,

Appellee

ON PETITION FOR APPEAL.

STATEMENT OF MATTER OR GROUND MAKING AGAINST THAT JURISDICTION OF THIS COURT ASSERTED BY THE APPELLANT AND MOTION BY APPELLEE TO DISMISS

The Sixth Ward Building & Loan Association of Newark, New Jersey, a corporation of the State of New Jersey, the above-named appellee, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States makes this statement disclosing the matter and

grounds making against that jurisdiction of this Court asserted by the above-named appellant.

In the statement filed pursuant to Rule 12 of the Supreme Court of the United States by the Appellant in this cause and in its Assignments of Error it erroneously alleges that the New Jersey Court of Errors and Appeals erred in failing to hold that 1937, Revised Statutes of New Jersey, 17: 12-53, was unconstitutional and in holding that it was constitutional in that the New Jersey Court of Errors and Appeals, in fact, did not consider the said act at all and made no decision as to its constitutionality or unconstitutionality but on the contrary the issue submitted to it by appellant and appellee and considered and decided by said Court was the constitutionality of Chapter 102, Pamphlet Laws 1932 being an amendment of Chapter 65, Pamphlet Laws 1925. Hence this Court is being asked to review an alleged decision of the New Jersey Court of Errors and Appeals, which in fact, was never made.

The appellant became a member of the appellee Building and Loan Association on October 1, 1928 and at that time the Act governing Building and Loans of New Jersey was "An Act concerning Building and Loan Associations, Revision of 1925", Chapter 65, Pamphlet Laws of 1925.

The sections relating to withdrawal being sections 49 and 52 were as follows:

> SECTION 49—"The shares of every such association of this State, or doing business therein, may be withdrawn by the holder at any time, by giving such written notice as may be provided for in the constitution or by-laws, not to exceed thirty days; if withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares, less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value;

in case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such withdrawal value and the difference only paid to such member; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section."

SECTION 52—"Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

These two sections are set up in the complaint filed by the appellant in the New Jersey Supreme Court as part of paragraph 3 of such complaint.

On August 17, 1932 the appellant gave to the appellee notice of his desire to withdraw said shares and at that time the said Revision of 1925 had been amended, so far as Section 52 is concerned, (49 remaining the same), so that Section 52 then read as follows:

SECTION 52—"Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the total receipts of any such association in any month, as income on investments authorized by section twenty-six hereof, dues on shares pledged with such association to secure loans authorized by para-

graphs II and V of section twenty-six hereof and repayment of loans authorized by paragraphs II and V of section twenty-six hereof shall be required to be used for the payment of withdrawals without the consent of the board of directors; provided, however, that if, in any one month the funds of the associations required to be available for the payment of withdrawals together with any other funds made available for such purpose by its board of directors, are at any time insufficient for the payment of all withdrawals which have been requested, then the right of any withdrawing member to priority of payment of the withdrawal value of his shares in the aforesaid order, shall be only to the extent of five hundred dollars in any one month and if all withdrawing members have received payments in full or on account of their withdrawals to the extent of five hundred dollars in any one month and there is then a balance of such funds available for the payment of withdrawals then said order of priority of payment, to the extent of five hundred dollars shall continue to apply until such balance is exhausted; and no withdrawals shall be paid if the funds available for the payment of matured shares are insufficient to pay all matured shares, the payment of which has been requested within thirty days after maturity; and members who have thus requested payment of their matured shares shall have a right to such payment prior to the rights of members who have requested payment of the withdrawal value of their shares. A member who has filed a notice or request for withdrawal shall not have the right to sue any such association to recover the withdrawal value of his shares or such part thereof as may not be paid, so long as the funds in the treasury of such association are applied as required herein.

See Chapter 102, Pamphlet Laws 1932.

The appellant instituted suit against the appellee on the Twenty-fourth day of March, 1939, at which time the statute governing Building and Loan Associations as far as with-

drawals are concerned, was Revised Statutes, 1937, 17:12-49 which reads as follows:

> "*Withdrawal of shares.* The shares of every building and loan association of this State, or doing business herein, may be withdrawn by the holder upon giving such written notice, not exceeding thirty days, as its constitution provides. Upon withdrawal of such shares a reasonable portion of the dividends or profits, if any, credited to such shares may be retained by such association and the remainder of the amounts credited on such shares, less fines and other obligations thereon, paid to the withdrawing member in the manner otherwise provided in this chapter, but no fines shall be deducted from the dues credited on shares which shall be withdrawn within one year after such shares shall have been subscribed. This section shall not be construed to prevent a reduction of the share liability of any such association to its members for the purpose of providing for losses or anticipated losses or of reserving against them as otherwise provided in this chapter. The commissioner, if it appears to him that the association is in an unliquid condition, may authorize the making of a written agreement, which shall be binding on assenting members of the association, whereby the assenting members shall agree not to file a notice of withdrawal before a date specified in the agreement. Notice of the agreement shall be printed or stamped upon the face of the certificate or pass book, or both, of each assenting member when the certificate or pass book comes into the possession of the association."

And 17:12-53 which is quoted in full on pages 3-5 of appellant's statement.

These Revised Statutes constituted a new enactment of law by the Legislature of 1937 and not a mere revision and such Revised Statutes were approved December 20, 1927 and became Chapter 188, Laws 1937.

The complaint filed by the appellant is as follows:

COMPLAINT

NEW JERSEY SUPREME COURT, ESSEX COUNTY.

HARRY M. VEIX,

Plaintiff,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, A CORPORATION,

Defendant.

Action at Law, Complaint.

Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, says that:

FIRST COUNT

1. On October 1, 1928, plaintiff purchased Twenty-five (25) Prepaid Shares of the Sixth Ward Building and Loan Association of the City of Newark, N. J. of a par value of Two hundred dollars ($200.00) each for which the plaintiff paid the defendant the sum of Five thousand dollars ($5,000.00).

2. By the terms thereof the defendant agreed to pay the plaintiff Six (6) per cent per annum interest on the face value of said shares.

3. At the time said shares "were purchased as aforesaid an act concerning Building and Loan Associations, Revision of 1925" being Pamph. L. 1925 C 65, was then in force which provided among other things as follows:

Section 49 provides as follows:

"49. How Withdrawn.

The shares of every such association of this State, or doing business therein, may be withdrawn by the

holder at any time, by giving such written notice as may be provided for in the constitution or by-laws, not to exceed thirty days; if withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares, less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value; in case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such withdrawal value and the difference only paid to such member; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section."

Section 52 of the Act provides as follows:

"52. Payment of withdrawals.

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

4. At the time said shares were purchased the Constitution of the defendant provided for withdrawal of prepaid certificates as follows:

Article XIX. Prepaid shares.

Section 2. Prepaid shares shall bear interest payable semi-annually on the First day of May and Novem-

ber of each year, at such rate as the Board of Directors may determine at date of issue and may be withdrawn by the holder thereof, upon giving Thirty days written notice prior to any regular meeting of the Association.

5. On August 17, 1932, the plaintiff gave the defendant written notice of withdrawal of said shares.

6. Thirty days thereafter plaintiff demanded of defendant payment of the withdrawal value of his said stock and interest due thereon.

7. Six months thereafter and on many other occasions said plaintiff demanded of defendant payment of the withdrawal value of his stock and interest due thereon.

8. At the time of such demands defendant had sufficient funds in cash on hand to pay the same and now has sufficient funds in cash to pay the same.

9. At the time of such demands the defendant was and still is solvent.

10. Subsequent to August 17, 1932, the date of plaintiff's withdrawal notice payments had been made by defendant upon other withdrawal applications.

11. The defendant claims to be operating under New Jersey revised Statutes 17 : 12-49 also 17 : 12-50—Source L 1925, C 65, Sec. 49, p. 211 as amended by L. 1932, C 92 Sec 1, p. 161, L 1935, C 59 Section 10 p. 152. 17 : 12-53 Source L 1925. C. 65, Section 52 p. 212, as amended by L. 1932, C 102 Section 1 p. 175, L 1935 C 59 Section 11, p. 153, L. 1936, C. 118 Section 4, p. 295, but all of these statutes in so far as they might affect the plaintiff's right herein are unconstitutional and within the inhibitions of Article 4 Sec. 7 paragraph 3 of the Constitution of the State of New Jersey and of Article 1 Section 10, of the Constitution of the United States of America, and of Section 1 of the Fourteenth

Amendment of the Constitution of the United States of America and therefore are void insofar as the plaintiff's rights are concerned.

12. There are no legal assessments, deductions or reserves which can or should be withheld from the plaintiff and any attempt on the part of the defendant to withhold any part of the plaintiff's money under alleged color thereof or under alleged color of any order of the Commissioner of Banking and Insurance of the State of New Jersey is done in violation of Article 4, Section 7, Paragraph 3 of the Constitution of the State of New Jersey and Article 1, Section 10 of the Constitution of the United States of America and Section 1 of the Fourteenth Amendment of the Constitution of the United States of America and is therefore void insofar as it may affect the right of the plaintiff herein.

13. There is due and owing from the defendant on said shares the sum of Five thousand dollars, together with interest from October 5, 1932, which sum has been demanded from the defendant, but payment has been refused.

Judgment will be claimed for Five thousand Dollars ($5,000.00) with interest at six per cent per annum from October 5, 1932 and costs of suit on the first count.

SECOND COUNT

1. On October 2, 1929 plaintiff purchased Seventeen and one-half (17½) Prepaid shares of The Sixth Ward Building and Loan Association of the City of Newark, N. J. of a par value of Two hundred dollars ($200.00) each, for which the plaintiff paid the defendant the sum of Three Thousand five hundred dollars ($3,500.00).

2. Plaintiff repeats the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the First Count and make them a part of this Count.

15. There is due and owing from the defendant the sum of Three thousand, five hundred dollars ($3,500.00) together with interest from October 5, 1932 which sum has been demanded from the defendant but payment has been refused.

Judgment will be claimed for the sum of Three thousand and five hundred dollars ($3,500.00) with interest at six per centum per annum from October 5, 1932 and costs of suit on the second count.

WALTER P. REILLY,
Attorney of Plaintiff,
790 Broad St.,
Newark, N. J.

ANSWER

(Filed April 24, 1939)

NEW JERSEY SUPREME COURT, ESSEX COUNTY

HARRY M. VEIX,

Plaintiff,

vs.

SIXTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY, a Corporation,

Defendant

Action at Law

Answer

The Defendant, Sixth Ward Building and Loan Association of Newark, New Jersey, a corporation, reserving all manner of objection to the Complaint herein and the right to move to strike out said Complaint at or before trial on the ground that the same does not set forth a cause of action in either of any of the counts therein set forth, for answer thereto says:

FIRST COUNT

1. It admits the allegations in Paragraph 1.

2. It denies the allegations in Paragraph 2.

3. It neither admits nor denies the allegations contained in Paragraph 3 and conceives and alleges that they are argumentative and improperly alleged.

4. It admits that its constitution contained the provision "Article XIX, Prepaid Shares" as set forth in Paragraph 4.

5. It admits the allegations in Paragraph 5.

6. It has no information nor knowledge of the truth of the allegations contained in Paragraph 6 and therefore neither admits nor denies the same.

7. It has no information nor knowledge of the truth of the allegations contained in Paragraph 7 and therefore neither admits nor denies the same.

8. It denies the allegations contained in Paragraph 8.

9. It admits the allegations contained in Paragraph 9.

10. It admits the allegations contained in Paragraph 10.

11. It does not answer the allegations contained in paragraph 11 as it conceives and alleges that they are argumentative in form and improper subject matter of complaint.

12. It does not answer the allegations contained in paragraph 12 as it conceives and alleges that they are argumentative in form and improper subject matter of complaint.

13. It denies the allegations contained in Paragraph 13.

SECOND COUNT.

1. It admits the allegations contained in Paragraph 1 of the Second Count.

2. It repeats the allegations contained in the Answer to Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the First Count and makes them a part hereof.

13. It denies the allegations contained in Paragraph 13 of the Second Count.

First Separate Defense.

The plaintiff is barred from bringing the said suit against the Defendant by the provisions of Revised Statutes of New Jersey, 1937—17:12-53 as follows:

"No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; * * *"

MULLIGAN & KOENIG,
Attorneys for Defendant.

Thereupon the appellant-plaintiff, moved to strike the answer of the appellee-defendant, and the appellee-defendant moved to strike the complaint of the appellant-plaintiff, each contending that the pleading moved against did not set forth a defense or cause of action.

Thereupon, on the Twenty-eighth day of April, 1939, the New Jersey Supreme Court, through Edwin C. Caffrey, Circuit Court Judge acting as Supreme Court Commissioner, "ordered that the said complaint be stricken out on the ground that it discloses no cause of action" and pursuant thereto on May 2, 1937, judgment was entered in favor of the defendant and against the plaintiff, costs of the defendant to be taxed.

Appeal having been taken to the Court of Errors and Appeals, the issue, argued and submitted to the Court was whether the Act of 1925 as it stood when the plaintiff became a member, should apply or whether the Act of 1925 as amended by Pamphlet Laws, 1932, Chapter 102, the Act in effect when the plaintiff applied for withdrawal should govern and if so whether it was constitutional. The Court of Errors and Appeals determined that the Act of 1932 should apply and that it was constitutional and having made that decision it did not find it necessary to consider other defenses raised by the appellee's answer. Hence the only Federal question in issue is as to the constitutionality of Chapter 102 of Pamphlet Laws 1932 and its applicability to

the instant litigation, and Revised Statutes 1937, 17: 12-53 was not passed upon by the Court or submitted for consideration by the parties.

The Court of Errors and Appeals conceived that this case was governed by its ruling in *Bucsi* v. *Longworth Building & Loan Association*, 119 N. J. L. 120 and *Rocker* v. *Cardinal Building & Loan Association*, 119 N. J. L. 134, copy of which opinions are attached to the appellant's statement filed in this Court and from which it will appear that the Pamphlet Laws 1932, Chapter 102 was the only Act considered by the New Jersey Court and from which it will further appear that these cases were submitted at the May Term, 1935 of the New Jersey Court of Errors and Appeals and decided October 26, 1937, all before the Revised Statutes of 1937 had been enacted.

Thus, even if the United States Supreme Court should declare the Act of 1937 unconstitutional or uphold its constitutionality it would have no bearing or effect whatsoever on the judgment below.

The appellant quoted Revised Statutes 1937, 17:12-53 in its statement filed in this Court and a comparison of that Act with the Pamphlet Laws 1932, Chapter 102 will reveal a marked difference in substance.

Indeed, a comparison of the Act of 1932 with the Act of 1925 as it stood when the appellant acquired his membership and when that 1925 Act is read in the light of its legislative history and the decisions of the State of New Jersey as hereinafter developed will reveal little if any change in substance between the privilege of withdrawal as given by the laws of 1932 and that practically in effect under the Laws of 1925, as they existed when the appellant acquired membership.

On the other hand, a comparison of the act of 1925 as in effect when the appellant acquired membership, with Re-

vised Statutes 1937, 17: 12-53 will show a rather marked difference between the philosophy involved in the transaction of withdrawal and in the percentage allocated to withdrawing members.

Moreover, it is to be observed that no opinion upon the motions addressed to the respective pleadings was rendered by the trial court, and while in the Court of Errors and Appeals the Court expressed the view that Pamphlet Laws 1932, Chapter 102 applied and governed the situation and held that Act constitutional, it is a fact that the action of the lower Court and the affirmance by the upper Court can be sustained for reasons that do not involve the constitutionality of the said Act of 1932. In other words, the action of the Court of Errors and Appeals in affirming the Court below in striking the complaint as not setting forth a cause of action can be sustained on a non-federal ground and therefore as we understand the decisions of the United States Supreme Court it will not take jurisdiction or allow an appeal under such circumstances.

(See *Pierce* v. *Somerset Railway*, 171 U. S. 641—43, L. Ed. 316 at page 319 and cases there cited).

The earliest type of Building and Loan Association did not permit a member to withdraw; withdrawal involved forfeiture of the investment. Later a privilege of withdrawal was conferred by the constitution of the various associations, thus leaving the shareholder at the mercy of management as to the extent and terms of withdrawal. Thus one association might allow a percentage of profits on withdrawal, another might deny such right, while still a third might actually retain a part of the money paid in and competition apparently would constitute the only or chief reason for generous or reverse treatment of a shareholder. It is reasonably safe to say that this situation as to withdrawals was at least partially the cause of the condition existent

prior to 1903 which justified the Court in *the Busci* case, in its statement that "it is a matter of such common knowledge as to require judicial notice that the operation of Building and Loan Associations in this State during the latter part of the last century had been so loose and utterly devoid of any consideration of the purpose for which they were created and the rights of the subscribing members that the situation was a public scandal and called for action on the part of our legislature."

To this situation the legislature addressed itself by the enactment of the first general building and loan act that of 1903, Pamphlet Laws 1903 page 457, as to which the Court in the *Busci* case at page 124 said:

> "The need of regulation in the public interest was obvious and the statute was enacted for the protection of the public savings under the inherent police power of the state."

Beginning about 1894 at which time there appears to have been some legislative investigation of the State and National Building & Loan Associations then in existence and still later when apparently another committee appointed by the assembly of New Jersey began to investigate the then building and loan conditions, see pamphlet laws 1898—199, the Associations came in for considerable criticism some of which appears in the annual reports of the Bureau of Labor and Industries on file in the New Jersey State Library, some in the reports of the Department of Banking and Insurance after it took over the supervision of the Associations in about 1899 and much of which is found in newspaper reports of meetings of the building and loan leagues and other meetings and in periodicals, a large part of which has been excerpted by Mr. John Warren in his History of Building and Loan Associations in the United States and his briefs which history and briefs were before the Court of Errors and Ap-

peals in the *Bucsi* and *Rocker* cases. Such investigations and such criticism undoubtedly in part formed the inspiration for the Act of 1903 as well as the earlier Act of 1899 page 357; which latter Act for the first time conferred the statutory privilege of withdrawal upon instalment shareholders and the amount that should be returned to such shareholders upon withdrawal. However, even this Act did not confer such privilege of withdrawal upon the paid up or full paid shareholder now known as the income shareholder. Under the earlier Act it had also been held that upon the maturity of shares in a building and loan association that is when the payments on said shares plus the profits had reached a mathematical value equal to the par of the shares, the shareholder became a creditor entitled to receive his money provided the funds arising from the appropriation of one-half of the receipts of the Association should be sufficient for such purposes—*Cunningham* v. *Mutual Building & Loan Association*, 72 N. J. L. 172-180.

It had also been held in the case of *Bettle* v. *Republic Savings and Loan Association*, 64 Atl. 176, that under the said Act of 1875 there was no authority for the issuance of income stock.

The Act of 1903 proceeded to confer the privilege of withdrawal upon paid up or full paid shareholders as well as upon instalment shareholders and to better fix the return to be made to withdrawing shareholders and such privilege of withdrawal is identical with that in existence under the revision of 1925 when the appellant became a member of the appellee Association. The Act also conferred the right to issue full paid shares carrying a fixed dividend in lieu of participation in the unfixed or general profits or paper profits of the Association but distinctly stated that no preferred shares could be issued and no shares other than common shares issued. It further provided that a member remained a member until paid thereby eliminating the effect

of the decision in the *Cunningham* case. See Pamphlet Laws 1903, page 459, Sec. 5. It further provided that all shareholders should occupy the same relative status as to debts and losses of the Association, Pamphlet Laws 1903, page 476, Sec. 53.

It thus is easy to see why the Court in *Fitzgerald v. State Mutual Building & Loan Association*, 76 N. J. Eq. 137 at 143, says "The general building and loan association Act of 1903 of which the sections already referred to touching withdrawals form a part will be found to contemplate throughout its provisions the central idea of co-operation, equality and mutuality upon the part of the members of the Association" and why it held that upon insolvency the holders of shares on which notice of withdrawal had been given are entitled to no preferment. Indeed, it is well settled that the privilege of withdrawal may only be exercised while an association is solvent since otherwise preference and discrimination must result.

Despite this legislative history the appellant contends that an unpaid withdrawing shareholder after six months is entitled as of right to sue his fellow members as represented by the Association and to take judgment with its consequent lien, preference and disruption. In other words, the appellant contends that the pendulum has swung from no privilege of withdrawal whatsoever and forfeiture upon withdrawal, to a situation where the withdrawing or terminating member has rights through which for his own benefit he may wreck the common enterprise and impair the rights of his fellow members. That the legislature could do this if it so desired we do not deny but we do say that before any such destructive result is arrived at it must appear plainly and clearly that the language expresses such legislative intention. The law as it stood when the appellant became a member is not so clear as to deny judicial con-

struction. The language is ambiguous and cries out for judicial construction.

We submit that the proper construction to be placed upon the withdrawal provisions as they stood in 1928 when the appellant became a member of the Building and Loan Association is that during the first six months after withdrawal no more than one half of the net receipts of the Association are applicable to the payment of withdrawing members although in its discretion the management may apply a greater percentage. After six months the management must apply in excess of one-half of such receipts but the Act is silent as to how much more than such one-half must be so applied. This silence speaks loudly for it indicates that the legislature contemplated that management would determine how much more than one half would be applied having in mind the interest of other shareholders including those able to carry on and having in mind the rights of creditors and having in mind the future of the Association as a whole. It was not the intent of the legislature to adopt a rigid rule but to prescribe an elastic remedy realizing that no legislation could rigidly govern every conceivable situation that might arise in every Association. The legislature never intended that after six months non payment of withdrawals every Association regardless of its condition must pay every withdrawing shareholder in full under penalty of suit. But it may be said that the legislature declares that the withdrawing shareholder may sue the Association, what does that mean? It means just this, that if in the exercise of that discretion which the legislature confers upon management after six months has elapsed the management exercises it capriciously or unreasonably and being able to pay a withdrawing shareholder in whole or in part without undue injury to his fellow members or the Association refuses to so pay or allocate the withdrawing member may sue. He has his

remedy and the Court upon such application will determine and adjust the equities. We think the proper remedy is by mandamus to enforce, in the discretion of the Court appealed to, the doing of justice. We do not think the right to sue given contemplates a suit as for debt particularly when the statute itself provides in effect that a member remains a member until paid and when the *Cunningham* case which made a maturing shareholder a creditor was in fact repealed by the 1903 Act. The legislature never intended by the language of this clause to determine everything to create a finality. It left to the Courts and management the working out of the many problems that would arise in the face of existing facts and circumstances.

As a matter of fact considering that the privilege of withdrawal only applies where an Association is solvent is it not apparent that so far as the Acts of 1903 and 1925 are concerned that up to 1932 the legislature had not undertaken expressly to legislate as to what the situation should be where the number of withdrawals on file were such that the Association could not pay all at one time. Pamphlet Laws 1932, Chapter 102, for the first time expressly legislated that where an Association could not pay all of its withdrawals it must pay them in a certain way and manner and by the allocation of one-half of the net receipts and as long as it did that it could not be sued.

We submit that this express legislation is nothing more or less than the proper interpretation of the Act of 1925 and that that which the legislature in 1932 laid down as a policy is the confirmation of the policy to be implied by a proper construction of the Act of 1925.

In *Fornatoro* v. *Atlantic Coast Building & Loan Association*, 10 N. J. Misc. Reports 1248, 163 Atl. 240, the Court in effect held that the transaction of withdrawal is a privilege, a legislative or statutory privilege and not a right and that a withdrawing member does not acquire the status of

a creditor by virtue of his notice of withdrawal. See also the illuminating opinion of Judge Cleary, Circuit Court Judge acting as Supreme Court Commissioner in *Rocker* v. *Cardinal Building & Loan Association*, 13 N. J. Misc. Reports 397.

In *Horowitz* v. *Guarantee Building & Loan Association* (an unreported case in one of our Circuit Courts abstracted 2 Mercer Beasley Review 192-201) the plaintiff a withdrawing shareholder brought suit against the Association more than ~~six months~~ after notice of his claim had been filed. Sec. 52 of the revision of 1925 was then in force and there was no allegation that the defendant Association was in possession of funds legally applicable to the plaintiff's claim for the withdrawal of his shares. The defendant moved to strike the complaint on the ground that it did not set forth a cause of action. The court sustained the motion and struck the complaint.

We submit that this is the law of the State of New Jersey and that a plaintiff bringing suit under section 52 of the Revision of 1925, assuming that mandamus is not the proper remedy, must allege and prove that at the time of the application for withdrawal the Association was in possession of sufficient net receipts or perhaps even of principal or corpus which could with safety to the Association and in justice to the other members of the Association be applied to the payment of the withdrawing shareholder instituting suit.

To adopt the construction contended for by the appellant would be to exalt the member who having embarked upon the enterprise falls by the wayside and desires to withdraw and to exalt him over that member who patiently and ploddingly continues his savings and is prepared so to do to maturity, not to speak of the borrowing member who can only acquire a debt free home if his fellow members continue their savings and keep the enterprise solvent.

As the Court of Errors and Appeals said in *Thirteenth Ward B. & L. Association* v. *Weissberg*, 115 N. J. Equity 487, page 493, "The right to withdraw without the forfeiture of the money paid in is in its essence a privilege. In becoming a member of the Association the shareholder does so ostensibly, at least with the purpose of remaining in it to the end, bearing his part of all its burdens and finally sharing all its profits in the same proportion. His failure to continue in the concern therefore is essentially in the nature of a breach of contract, upon which the loss of his previous contribution might, nor unreasonably, be held to follow. But circumstances unforeseen at the time of his assumption of membership, may, without any wrong on his part, make a severance of his connection with the association desirable, if not imperative. Endlich on Building Associations, 82, 83.

If appellant's contention is sound the power of withdrawal is much more than a privilege; it is a right, after six months, to wreck the Association if the withdrawing shareholder is not paid. Incidentally, in the *Thirteenth Ward B. & L. Association* case just cited the Court held that a shareholder in a building and loan association does not acquire a vested right to the profits apportioned to his share at the annual meeting of shareholders, that apportioned profits pending maturity are paper profits, unfixed profits which do not become complete until maturity is attained. And yet if the appellant is correct after a six months wait a withdrawing shareholder must receive not only what he paid in but a reasonable share of such profits and failing such payments may reduce his claim to judgment and place it upon an apparent parity with bank or other general creditors. This statute certainly does not permit of any such construction.

We have alluded to the fact that by the Act of 1903 a member remained a member until paid and that policy is reflected in the Revision of 1925 and also in the amendment

to such Revision adopted in 1932 as well as in all later legislation. Chapter 90 Laws 1932 page 159. So also the later Acts, Revision of 1925 and the amendments thereto and the Revised Statutes of 1937 all contain provisions in the interest of equality, co-operation and mutuality, even to a greater extent than those in the Act of 1903 which justified the comment of Vice Chancellor Leaming in the *Fitzgerald* case heretofore set forth. And in the case of *Sommer* v. *Workingmen's Building & Loan Association*, 8 Atlantic Reporter 2nd 229, one of our trial courts held that under our legislation a member remains a member until paid and that the *Cunningham* case hereinbefore cited has been repealed by the subsequent building and loan legislation.

Nor is the decision of the Supreme Court of the United States in the case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189-56, Supreme Court Reports 408-80, L. Ed. 391, one in which the Court held a comparable statute of Louisiana unconstitutional as impairing the obligation of contracts and destroying vested rights as alleged by the appellant in his statement. The facts in this case are quite different from those under consideration in the *Treigle* case. In the *Treigle* case the shareholder applied to withdraw under the Act which was in effect when he became a member and thus his potential right of withdrawal had fruitioned into a vested right prior to the passage of the legislation then under review in the United States Supreme Court. Sometime after his rights had thus vested the legislature of Louisiana sought to so far change such vested rights as to place within the discretion of the management of the shareholder's association when and how much and what the shareholder should receive on withdrawal.

In the instant case that is not the situation. Appellant became a member under the Revision of 1925 and he did not apply to withdraw, that is, his potential statutory privilege

of withdrawal did not fruition into a vested right as the result of exercising such privilege, until several months after the legislature which had conferred the statutory privilege had elected to change it. Therefore, the *Treigle* case is not dispositive of the situation here even if only a Federal question is involved. Nor is there in fact an impairment of contract as alleged by the appellant assuming the applicability of the *Treigle* case. This is said because upon a comparison of the amendment, Pamphlet Law 1932, Chapter 102 with the Revision of 1925 as it stood when appellant became a member, it will be seen that there is no substantial difference between the privileges under the two acts when the Act of 1925 is read and construed in the light of the legislative history of the Act and in the light of the principle of equality and co-operation which are fundamentals of the building and loan movement. The only difference is that the 1932 Act expressly sets forth the procedure to be followed where the receipts of the Association are insufficient to pay all withdrawing shareholders without producing preference and discrimination, while the Revision of 1925 refers it to management to work out equity and justice among withdrawing and continuing shareholders subject to the power of the court to adjust the equities in the event of capricious and unreasonable conduct on the part of the management.

It must never be overlooked that while prior to 1899 the power of withdrawal was purely contractural and the shareholder subject to the control of management in such respect, the legislature in 1899 adopted a policy which removed this power from the realm of the contractural and placed it upon the basis of a statutory privilege, with which management could not interfere and which could only be changed by the legislature appellant took subject to this legislative policy. And finally it is to be observed that

although the application for withdrawal was made in August of 1932 it was not until March of 1939 that suit was instituted and since the rights of other shareholders and of the Association itself have been changed during that period and since while the appellant was silent and did nothing after applying for relief under the new amendment the Association and his fellow members have proceeded to operate and stay in business under and by virtue of the Act of 1932 the appellant cannot claim an impairment of contract at this late day.

We respectfully submit because of the foregoing grounds and matters that this Court has no jurisdiction of the appeal or at least should not take jurisdiction of this appeal and respectfully move to dismiss such appeal because of such grounds and matters.

Respectfully submitted,

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